

**BBMB Kewangan Berhad v. Jabatan Pengangkutan
Jalan Negeri Johor Darul Takzim & Anor.**

[1994] 1 CLJ

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BBMB KEWANGAN BERHAD

v.

**JABATAN PENGANGKUTAN JALAN
NEGERI JOHOR DARUL TAKZIM &
ANOR.**

HIGH COURT, JOHOR BAHRU

DATO' JAMES FOONG J.

[ORIGINATING SUMMONS NO. 504 OF
1992]

26 JUNE 1993

DECLARATION: Detention of vehicles to prohibit re-occurrence of offences relating to licenses for commercial vehicles - Ownership of vehicles claimed by plaintiff bank - Whether there is sufficient evidence to prove the ownership - Auction of vehicles by order of magistrate - Whether the plaintiff or the state entitled to the proceeds - Whether vehicles were 'detained' or 'seized' - Jurisdiction of a Civil Court to grant declaratory relief on a judgment already decided by a Criminal Court.

This was an application for declaratory reliefs pertaining to the detention and subsequent action of 2 vehicles which plaintiff claimed ownership of. The vehicles were detained by the 1st defendant to prevent the re-occurrence of an offence under s. 33 of the Commercial Vehicles Licensing Board Act 1987 (CVLB Act) and s. 90 of the Road Transport Act 1987. The registered owners of the vehicles were one Subas and Kaju respectively. However, there appeared on the log book endorsements "Milik dituntut oleh BBMB Kewangan."

The notices of detention issued to Subas and Kaju did not indicate the dates of issue. Subas pleaded guilty to the charge under s. 33 and the vehicle was auctioned off in pursuance of a forfeiture order by the Magistrate.

The plaintiffs claimed the following declarations:

- (1) that they were owners of the vehicles
- (2) that they were entitled to the proceeds of the auction
- (3) that the public auction was wrong in law
- (4) that they have a right or an interest in the vehicles after being informed by the defendants subsequent to the seizure
- (5) in the alternative that they be compensated with damages.

a Held:

[1] There has been no sufficient evidence put before the court to convince the court that the plaintiff is the owner of both vehicles in face of the fact that the log book shows Subas and Kaju to be the registered owners. The endorsements in the log book relied upon by the plaintiff to show ownership is insufficient; further evidence is needed to prove ownership and moreover the plaintiff has failed to specify the type of ownership it lays claims to. On these grounds, the first declaration prayed for is declined.

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[2] The issue regarding the second prayer is whether the plaintiff is entitled to the proceeds of the auction. Section 51 of the CVLB Act grants a discretion to the Magistrate to either order a forfeiture of the vehicle or a release. Since the Magistrate has exercised his discretion and ordered a forfeiture, the proceeds after disposal revert to the state for s. 51 does not mention that the proceeds belong to anyone else. The second declaration cannot be granted.

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[3] As regards the third declaration, the present court must determine whether it has the jurisdiction to rule whether the forfeiture order was wrongly granted. Caselaw shows that the present court can consider an application for declaratory relief on judgment already decided by the Criminal Court.

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Although the vehicles were originally detained under s. 64(1) the authorities can be implied to have seized the vehicles after their detention and have them subjected to forfeiture under s. 51(3) of the CVLB Act. Since the forfeiture order was properly granted, the third prayer is refused.

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[4] Proof to legal ownership of the vehicles confers an inherent right to the same; a right which exists from the moment one becomes an owner and ceases the moment the ownerships come to an end. Such rights do not depend upon before or after the plaintiff was informed of the vehicles' seizure and/or before the auction. Therefore, there is no necessity for the court to grant the fourth prayer.

[5] As no damage was done to the plaintiff, the fifth prayer is dismissed.

[Application dismissed with costs].

Cases referred to:

- i** *Imperial Tobacco Ltd. v. AG* [1980] 1 All ER 866 (refd)
A. Rajanathan [1982] 1 MLJ 139 (refd)

Munnich v. Godstone Rural District Council [1966] 1 All ER 930 (**refd**)
Datuk Syed Kechik v. Government of Malaysia [1979] 2 MLJ 101 (**refd**)

Legislation referred to:

Commercial Vehicles Licensing Board Act 1987, ss. 33, 34, 51(3)
 Road Transport Act 1987, ss. 64(1), (4), 90(1)
 Rules of the High Court 1980, O. 15 r. 16
 Specific Relief Act 1950, s. 41

For the plaintiff - Ibrahim Hashim; M/s. Hassan Ibrahim & Co.

For the defendants - Haliza Anni bt. Dato' Othman, Jabatan Peguam Negara

JUDGMENT

James Foong J:

This is an application by the plaintiffs by way of originating summons for the following:

- (1) a declaration that the plaintiffs are the owners of vehicles bearing registration numbers JCD9148 and JBY9157;
- (2) a declaration that the plaintiffs have the right to a sum of RM12,000, the proceeds of an auction now kept with the defendants;
- (3) a declaration that the public auction carried out by the defendants was wrong in law;
- (4) a declaration that the plaintiffs have the right and/or possess an interest in both the aforesaid vehicles after being informed by the defendants subsequent to the seizure of the vehicles and/or before the vehicles were auctioned;
- (5) in the alternative a declaration that the plaintiffs be compensated with damages to be taxed.

The facts of the case are these. On 8 November 1990, a motor vehicle bearing registration number JCD9148 was detained by the 1st defendant, to prevent the re-occurrence of an offence under s. 33 of the Commercial Vehicles Licensing Board Act 1987 (which I shall for short call the CVLB Act.). Section 33 prohibits any person to use or cause to use a motor vehicle as a 'public service vehicle' unless with a licence.

On 15 November 1990, a motor vehicle bearing registration number JBY9157 was detained by the 1st defendant, to prevent the re-occurrence of offences committed under s. 33 of the CVLB Act and s. 90 of the Road Transport Act 1987 (for short I shall refer to as the RTA). Section 90 of

a the RTA requires motor vehicle users to be insured against 3rd party risks and, failure to do so is an offence.

The registered owner of vehicle JCB9148 was, according to the registration of vehicle card or the log book as is commonly called, one Subas a/l Mooly Naiko (for ease of reference I shall refer to him as Subas). There is an ownership claim by the plaintiffs endorsed on the log book.

b As for vehicle number JCD9148, according to the log book the registered owner is or was Kajunathan a/l Muniandy (for short I shall refer to him as Kaju). Similarly, it has an ownership claim of the plaintiffs endorsed thereon.

c Subsequent to the vehicles being detained, the 1st defendant through its officers issued a notice of such detention of the vehicles to Subas and Kaju respectively. Both these notices as exhibited in the affidavit of the 1st defendant's officer are addressed to Subas and Kaju respectively. There is no date written on both the notices to indicate when they were written.

d The operative part of the notices begin with the words "Di bawah kuasa-kuasa yang terkandung di dalam seksyen 64(1) RTA, saya ... (nama pegawai), Pegawai Pengangkutan Jalan Negeri Johor, telah menahan kenderaan tersebut di atas kepunyaan tuan di pejabat ini mulai 8 November 1990 (in the case of Kaju) dan 15 November 1990 (in the case of Subas) sehingga diberitahu kelak untuk memberhentikannya dari berlaku lagi kesalahan (sila lihat butir-butir kesalahan di sebelah) di bawah s. 33 Akta Lembaga Pelesenan Kenderaan Perdagangan 1987 Act (in the case of Kaju) and s. 33 Akta Lembaga Pelesenan Kenderaan Perdagangan 1987 Act and s. 90 of the RTA (in the case of Subas).

e f g On 19 June 1991, the plaintiffs wrote to the 1st defendant obviously to enquire about the vehicles. The reply from the 1st defendant was dated 13 August 1991, informing the plaintiffs that the vehicles were "detained" under s. 64(4) of the RTA and, that the cases involving the vehicles were pending hearing at the High Court.

h i On 14 October 1991, Subas pleaded guilty to a charge brought against him by the 1st defendant under s. 33 of the CVLB Act. The learned Magistrate ordered vehicle number JBY9157 to be forfeited. In pursuance to this forfeiture order, the said vehicle was auctioned off for a

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sum of RM12,000. This RM12,000 is still in the hands of the 1st defendant.

On 15 December 1990, Kaju pleaded guilty to the charge brought against him by the 1st defendant under s. 33 and 90(1) of the CVLB Act and RTA respectively. In respect of vehicle JCD9148 it was not ordered to be forfeited by the learned Magistrate. However, there is an appeal pending in the High Court against this decision of the Magistrate. This vehicle, according to the 1st defendant's affidavit, is still being detained pending the outcome of the appeal.

Now that the facts of this case are clearly set out, I shall refer and deal with each of the declarations sought by the plaintiffs.

In respect of the first declaration that the plaintiffs are the owners of the said vehicles, I am sad to note that no sufficient evidence are laid before this Court to prove this point. Except for one a statement sentence contained in para 3 of the affidavit of Mohd. Anwar bin Hamid (Encl. 2) that, "pihak plaintiff adalah tuanpunya kenderaan-kenderaan yang berdaftar nombor JBY9157 dan JCD9148" and two copies of log book attached, no other evidence of ownership are tendered. As for the log books tendered, it only has an endorsement "Milik dituntut oleh: BBMB Kewangan Bhd. - Siri surat no. 5667" and "siri surat no. 6317" for vehicle number JCD9148. The registered owners alleged by the defendants and as shown in the log books of both the vehicles are Kaju and Subas respectively. Though there may be an ownership claim by the plaintiffs on the aforesaid vehicles, this Court cannot declare that they are the "tuanpunya" - owners of the said vehicles. If the plaintiffs wish to assert that they are or were the "legal owners" then they must tender further evidence to this effect, for as it is, written on the log books are the names of Kaju and Subas as "pemilik berdaftar" - registered owner. To ask this Court to declare who are or were the "owners" generally of the vehicles and not specifying the type of ownership, this Court will refuse to grant in view of the existence of the names of Kaju and Subas as registered owners and, the lack of further or other evidence.

As for the second application of the plaintiffs, that of a declaration that the plaintiffs have the right to a sum of RM12,000 being the proceeds of the auction now kept with the defendants, this Court must consider whether the plaintiffs

a are entitled to it in the first place. The sum of RM12,000 is, as stated in the facts of this case derived from a public auction carried out by the 1st defendant, consequent to a Magistrate order for the forfeiture granted in respect of JBY9157. The forfeiture order was granted in pursuance to s. 51 of the CVLB Act due to the fact that Subas was charged and pleaded guilty to s. 33 of the CVLB Act.

b Section 51 of the CVLB Act grants a discretion to the Magistrate trying the case to determine whether to forfeit or release the vehicle seized for an offence against ss. 33 or 34 of the CVLB Act.

c When the learned Magistrate had exercised his discretion and ordered forfeiture, the proceeds of sale derived consequent to the disposal of the said vehicle, do not belong to the plaintiff or to the registered owner Subas but, to the State for nowhere in s. 51 of the CVLB Act does it state that the proceeds of such sale should be returned to anybody else.

d I am of the opinion that the plaintiffs may be under a mistaken apprehension that s. 64(4) of the RTA may equally apply to this situation.

e Section 64(4) of the RTA provides for any vehicles detained under s. 64(1) of the RTA to be auctioned by the authorities stated in the RTA, after due notice in writing are given to the owner and if the owners do not make any claim for such vehicles after 3 months. The proceeds from such auctions shall be applied to pay any licence fees which may be due in respect of the said vehicles and, any other charges incurred, with the surplus (if any), to be paid over to the owners or, if not claimed by such persons within 12 months after the date of disposal, to the authorities.

f The sale of the said vehicle JBY9157 was carried out consequent to the forfeiture order granted by the Magistrate under s. 51 of the CVLB Act and not by the authorities under s. 64(4) of the RTA. Under such circumstance the plaintiffs' second prayer cannot be granted.

g The third prayer of the plaintiffs is that the public auction carried out by the defendants was wrong in law.

h In considering this prayer for such a declaration, I paused to consider whether this Court has the jurisdiction to decide on an issue which may affect and touch upon the decision of the Magistrate in a criminal case.

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This point arose from the fact that the notice issued to Kaju and Subas by the authorities were for the detention of the said vehicles under s. 64(1) of the RTA.

Section 64(1) of the RTA provides the authorities with power to detain vehicles whenever it appears that such vehicles or its drivers cannot be sufficiently identified or, that such actions are necessary to cause a discontinuance of the offence.

However, both the vehicles in this case seem to be "seized" under s. 51 of the CVLB Act while notices sent out indicate "detention" under s. 64(1) of the RTA.

Section 51 of the CVLB Act provides the authorities with power to seize vehicles if there is reasonable cause to suspect that there has been committed any offence against s. 33 or s. 34 of the same Act.

Therefore, from the above, one can see the difference. If it was detained under s. 64(1) of the RTA, the proceeds of any sale thereunder, after relevant deductions shall be refunded to the owner whilst, if sale is under s. 51 of the CVLB Act the proceeds revert to the State.

In the case of *Imperial Tobacco Ltd. v. AG* [1980] 1 All ER 866, a House of Lords decision, it was held that:

where criminal proceedings were properly instituted and were not vexatious or an abuse of the process of the Court, it was not a proper exercise of judicial discretion for a judge in a civil court to grant the defendant in the criminal proceedings a declaration that the facts alleged by the prosecution did not in law prove the offence charged, because to make such a declaration would be to usurp the function of the criminal court without binding it, and would thus inevitably prejudice the criminal trial one way or the other. Accordingly the declaration ought not have been granted.

This case was adopted by our then Federal Court in *A. Rajanathan* [1982] 1 MLJ 139. However, it is of interest to note that in the case of *Imperial Tobacco Ltd. v. AG*, there was a criminal trial pending for decision on almost the same point of law while the applicants attempted to seek a declaration in the civil Court. In our present case, the Magistrate had given his decision and made the forfeiture order. Is it then available to this Court to rule by way of a declaration directly or indirectly that in part or

a otherwise, the order by the Magistrate was wrongly granted?

Section 41 of the Specific Relief Act allows:

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief.

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Order 15 r. 16 of the Rules of the High Court provides:

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No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declaration of right whether or not consequential relief is or could be claimed.

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In the case of *Munnich v. Godstone Rural District Council* [1966] 1 All ER 930, an English Court of Appeal decision, allowed an application for declaratory relief to be considered when the applicant had already been convicted on criminal proceedings for having failed to comply with provisions of a planning enforcement notice. The applicant had pleaded guilty and was fined. Two months later he issued a writ seeking a declaration that no valid enforcement notice was served on him and that he was entitled to unconditional planning permission.

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From the aforesaid authorities, I am of the view that this Court can consider an application for declaratory relief on judgments already decided by the criminal courts. As stated by Lee Hun Hoe CJ, Borneo (as he then was) in *Datuk Syed Kechik v. Government of Malaysia* [1979] 2 MLJ 101,

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the prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited save only to its own discretion.

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In this case, the fundamental question is whether the forfeiture order granted by the Magistrate was correctly granted. To this the plaintiffs' counsel, Encik Ibrahim argued that the vehicles were 'detained' and not 'seized'. They were detained because the notices sent to Kaju and Subas clearly state that the authorities were exercising powers under s. 64(1) of the RTA and, this section only grants the authorities the power to detain and not seize. As the vehicles were only detained any surplus proceeds

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derived from their sale by the authorities should be reverted back to the owners. As the owners cannot be found and that the plaintiffs are claiming to be one, the money should be returned to them.

Though it is an undenied fact that the vehicles were originally detained, they could be seized by the authorities at any time upon suspicion that an offence under s. 33 of the CVLB Act is contravened. Section 51 of the CVLB Act provides the authorities with the power to seize and as the suspected offence under s. 33 of the CVLB Act is clearly stated on both the notices to Kaju and Subas, the authorities can be implied to have seized the vehicles after their detention and have them subjected to forfeiture by the Magistrate under s. 51(3) of the CVLB Act.

As the Magistrate had exercised his discretion properly on the forfeiture on one of the vehicles so lawfully seized, this Court has to refuse the plaintiffs' 3rd prayer.

I shall now refer to the fourth prayer of the plaintiffs and, that is for a declaration that the plaintiffs have the right and/or possess an interest in both the aforesaid vehicles after being informed by the defendants subsequent to the seizure of the vehicles and/or before the vehicles were auctioned.

It is trite law that if the plaintiffs can prove that they are the legal owners of the said vehicles, they certainly have an inherent right to the same. This inherent right exists from the very moment they became owners and will only cease when their ownerships come to an end. Such rights do not depend upon before or after the plaintiffs were informed that the vehicles were seized and/or before one of them was auctioned. In view of this, I find that there is no necessity for this Court to grant the fourth prayer to the plaintiffs.

As for the fifth prayer, I shall dismiss the same for there is no damage done to the plaintiffs.

Based on the aforesaid, I hereby order that the plaintiffs summons-in-chambers (Enclosure 3) be dismissed with costs.

**a BORNEO HOUSING MORTGAGE
FINANCE BERHAD**
v.
**b THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF MAUREEN LEE LUN
WAH (DECEASED) & ANOR.**

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[SUIT NO. T 55 OF 1988]
30 NOVEMBER 1993

c *GUARANTEE: Action against guarantor - Contention of guarantor that plaintiff has failed to prove execution of guarantee - Execution of guarantee not specifically denied by guarantor - Rules of pleading - Effect of inclusion of guarantee document in Agreed Bundle of Documents - Whether guarantor is entitled to the benefit of any term in the loan agreement.*

d The plaintiff in this action sues the second defendant (D2), the guarantor for a loan agreement cum assignment obtained by the first defendant (D1), the wife of D2. The property forming the security for the loan had already been auctioned off to the plaintiff, the highest bidder. The plaintiff claims against D2 the balance of the debt still due and owing.

The Counsel for D2 raised several points on behalf of the defence case. They were as follows:

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1. That the plaintiff had failed to prove its claim. The person who attested the signature of D2 to the guarantee had passed away and therefore was not called as witness to prove that the guarantor had executed the guarantee document.
 2. That there was no evidence D2 had requested the plaintiff to lend money to D1 as stated in the recital of the guarantee.
 3. That although there is no provision for a demand to be made in the guarantee itself, D2 by reason of being the principal debtor is entitled to the benefit of the clause in the loan agreement which reads:
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To repay to the [plaintiff] **on demand**
h the Loan...
 4. That clause 2 of the guarantee stipulates a demand must be made for payment after the property which was the security under the loan was sold. No demand was in fact made to the guarantor.

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